SUPREME COURT, U. S.
FILED
FEB 23 1966
JOHN F. DAVIS, CLERK

No. 943

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1965

RANGEN, INC., a corporation, BUHL FEED & ICE COMPANY, a corporation, and ELWOOD D. GRIMES,

Petitioners,

- vs -

STERLING NELSON & SONS, INC., a corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

PAUL H. RAY
Ray, Quinney & Nebeker
300 Deseret Building
Salt Lake City, Utah
Attorney for Respondent

Of Counsel:
MARVIN J. BERTOCH
300 Deseret Building
Salt Lake City, Utah
L. RIDD LARSON
300 Deseret Building
Salt Lake City, Utah

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	2
JURISDICTION	2
STATUTES INVOLVED	2
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	10
ARGUMENT	
POINT I	
The Circuit Court correctly applied Section 2(c) of the Robinson-Patman Act to the facts of this case consistent with the decisions of this court and other courts	14
A. Commercial Bribery and Price Discrimination Issue	14
B. "For Services Rendered" Issue	16
C. "Government Official" Issue	19
POINT II	
The Circuit Court correctly applied this court's decision in *Moore v. Mead's Fine Bread* 348 U.S. 115 (1954) in holding that the payments Rangen made to Grimes in connection with the sales of fish feed Rangen made to Idaho where payments and sales when Rangen was "engaged in commerce, in the course of such commerce" as provided by Section 2(c) of the act [15 U.S.C. § 13(c)]. That application is not in conflict with any decisions of any court	20

POINT III

The Circuit Court correctly applied the decisions of this court and other courts to the issues of "fact of damage" and "amount of damage" 28
A. Fact of Damage 28
B. Amount of Damage 30

POINT IV

The record and findings of fact support the conclusion of law that defendants violated Sections 1 and 2 of the Sherman Act, and that conclusion would support the judgments of the District Court and Circuit Court 34

POINT V

The Idaho Code Section 48-202(c) is substantially the same as 15 U.S.C. § 13(c). Idaho Code Section 48-204 is substantially the same as 15 U.S.C. § 15. Those sections support the judgment, in part 35

CONCLUSION 36

APPENDIX A-1

CASES CITED

Bankers Life and Casualty Co. v. Larson (CA-5) 257 F.2d 337 (1958) 20, 35

Biddle Purchasing Co. v. FTC (CA-2) 96 F.2d 687, 690 (1938) 16

Bigelow v. R K O Pictures, Inc., 327 U.S. 251 (1946) 29, 30, 33

Borden Co. v. FTC (CA-7) 339 F.2d 953 (1964) 11, 23, 24, 26

Canadian Ingersoll-Rand Co. v. D. Loveman & Sons, Inc., (D.C.-N.D. Ohio) 227 F. Supp.829 (1964) .. 14, 15, 17, 18

Christensen v. Paramount Pictures Inc. (DC-Utah) 95 F. Supp. 46 (1950) 36

Continental Ore Co. v. Union Carbide Corporation 370 U.S. 690 (1962) 19, 35

Eastern R.R. Pres. Conference v. Noerr Motor Freight, Inc. 365 U.S. 127 (1961) 19

Elgin Joliet and Eastern R.R. Co. v. Gibson, 335 U.S. 897 (1957) 27

FTC v. Henry Broch & Co., 363 U.S. 166, 80 S.Ct. 1158, 4 L.Ed.2d 1124 (1960) 15, 16, 17

Fitch v. Kentucky-Tennessee Light & Power Co. (CA-6) 136 F.2d 12, 149 A.L.R. 650 (1940) 14, 15, 17, 18

Foremost Dairies Inc. v. FTC (CA-5) 348 F.2d 674, 676 (1965) 27

Fox West Coast Theatre Corporation v. Paradise Building Corporation 264 F.2d 602 (1958) 29

Great Atlantic and Pacific Co. v. FTC (CA-3) 106 F.2d 667, 675-677 (1939) 16, 17

Harman v. Valley National Bank of Arizona (CA-9) 339 F.2d 564 (1964) 20

Lessig v. Tidewater Oil Co. (CA-9) 327 F.2d 459 (1964) 30

Moore v. Mead's Fine Bread Co., 348 U.S. 115 (1954) 11, 20, 21, 24, 26

Sterling Nelson & Sons, Inc. v. Rangen, Inc. (D-Idaho) 235 F. Supp. 393 (1964) 5, 17

Norville v. Globe Oil and Refining Co. (CA-7) 303 F.2d 281 (1962) 18

Oliver Bros. v. FTC (CA-4) 102 F.2d 763, 767-768 (1939) 16

Parmlee Transportation Co. v. Keeshin (CA-7) 292 F.2d 794 (1961) 18

Rangen, Inc. v. Sterling Nelson & Sons, Inc., (CA-9) 351 F.2d 851 (1965) 5

Richfield Oil Corporation v. Karseal Corporation, (CA-9) 271 F.2d 709 (1959) 29, 30

Southgate Brokerage Co. v. FTC (CA-4) 150 F.2d 607 (1945) 16

Storey Parchment Co. v. Patterson Co. 280 U.S. 554 (1931) 13, 29, 33

United Mine Workers v. Pennington 381 U.S. 657 (1965) 19

United States v. Boston and Maine R.R. 380 U.S. 157 (1965) 18

United States v. Women's Sportswear Association, 336 U.S. 460 (1949) 34

Webb-Crawford Co. v. FTC (CA-5) 109 F.2d 268 (1948) cert. denied 310 U.S. 638, 60 S.Ct. 1080, 84 L.Ed. 1406 (1940) 14, 15, 17, 18

Willard Dairy Corporation v. National Dairy Products Corporation (CA-6) 309 F.2d 943 (1962) 11, 23, 24, 26

STATUTES CITED

15 U.S.C. § 1 ..... 2, 4, 5, 6, 13, A-1

15 U.S.C. § 2 ..... 2, 4, 5, 6, 13, A-2

15 U.S.C. 13(c) 2, 4, 5, 6, 10, 14, 20, A-2

15 U.S.C. § 15 ..... 2, 4, 5, A-2

Idaho Code § 48-202(c) 2, 4, 5, 6, 14, A-3

Idaho Code § 48-204(a) 2, A-3

Idaho Code § 5-218(1) 2, 4, A-3

MISCELLANEOUS

Borden Company, order to cease and desist, Federal Trade Commission DKT No. 7474 (1964) Trade Regulation Reporter [¶ 16,776 Transfer Binder 1963-1965 page 21,708] (1964) 24

Rule 52, Federal Rules of Civil Procedure 29

No. 943

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1965

RANGEN, INC., a corporation, BUHL, FEED & ICE COMPANY, a corporation, and ELWOOD D. GRIMES,

Petitioners,

- vs -

STERLING NELSON & SONS, INC., a corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent files this Brief in opposition to the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of the United States District Court for the District of Idaho.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 351 F.2d 851. The findings of fact and conclusions of law and opinion of the United States District Court for the District of Idaho are reported at 235 F. Supp. 393.

JURISDICTION

Respondent agrees that petitioner has invoked this Court's jurisdiction under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The statutes involved in determination of the questions presented are 15 U.S.C. § 15, 15 U.S.C. § 13(c), 15 U.S.C. §1 and §2, and Idaho Code §48-202(c), §48-204 and §5-218.

QUESTIONS PRESENTED

Respondent contends that based on the findings of fact and conclusions of law of the United States District Court for the District of Idaho which were affirmed by the United States Court of Appeals for the Ninth Circuit and which are overwhelmingly supported by the record, petitioner has misstated the questions presented. The questions presented are as follows:

1. Whether or not Section 2(c) of the Robinson-Patman Act amendment to the Clayton Act [15 U.S.C. § 13(c)] applies to payments made by a seller (Rangen, Inc.) to a buyer's (State of Idaho) employee

(Elwood Grimes) who was the buyer's advisor and authority on the product sold (fish food) where:

(a) The seller's payments to the buyer's employee were made pursuant to an understanding between the buyer's employee and seller that in consideration of those payments the employee would attempt to influence and did influence his employer to purchase said product exclusively from the seller; and

(b) The buyer had no knowledge of the secret payments and agreement.

2. Whether or not the seller (Rangen, Inc.) made the payments to the buyer's employee (Grimes) and sales of fish food to the buyer (State of Idaho) when "engaged in commerce, in the course of such commerce" where:

(a) The seller and the respondent (Sterling H. Nelson & Sons, Inc.) were engaged in the sale of said product in several states as "primary line" competitors.

(b) The income of the seller (Rangen, Inc.) obtained from its interstate sales of the product, financed the bribe; and the seller's treasury, fattened by the sales acquired by the bribe, helped finance the seller's lower prices to various other states in interstate commerce.

(c) The respondent, a "primary line" competitor of the seller in interstate commerce, was precluded as a result of the bribe from making interstate sales to the buyer (State of Idaho) and placed

at a disadvantage in competing with the seller's lower prices to other States in interstate commerce.

3. Whether or not respondent has established the "fact of damage" where it has proved it was precluded by the bribe from selling to the buyer, and that the buyer would have purchased all or part of the fish food from the respondent had it not been for the bribe.

4. Whether or not respondent "justly and reasonably estimated" its "amount of damage."

The respondent submits that there are additional questions in the case at bar. The District and Circuit Courts' judgment for respondent under 15 U.S.C. §15 was based upon 15 U.S.C. §13(c). Respondent contends that the judgment could also have been based upon the Sherman Act, 15 U.S.C. § 1 and § 2, and it could have been based, in part, upon the Idaho Code. Therefore, further questions presented in support of the judgment below are:

5. Whether or not the findings of fact and record support a judgment for respondent based upon Sections 1 and 2 of the Sherman Act (15 U.S.C. § 1 and § 2).

6. Whether or not Idaho Code § 48-202(c) which is virtually a counterpart of 15 U.S.C. § 13(c) applies and if said section does apply what is the limitation of action period under Idaho Code §5-218.

STATEMENT OF THE CASE

Respondent, Sterling H. Nelson & Sons, Inc., (hereinafter referred to as "Nelson") brought this

action against its competitor in interstate commerce, the Petitioners, Rangen, Inc. and Buhl Feed and Ice Company, a division of Rangen, Inc. (both hereinafter referred to as "Rangen") and the Petitioner, Elwood D. Grimes, an employee of the State of Idaho's Department of Fish and Game, (hereinafter referred to as "Grimes").

Nelson alleged that it had been damaged as a proximate result of Rangen's and Gimes' violation of antitrust laws [15 U.S.C. 13(c), 15 U.S.C. § 1 and § 2] and was entitled to judgment for damages under 15 U.S.C. § 15. Nelson further alleged that it was entitled to a judgment for damages under the Idaho statute [Idaho Code § 48-202(c)] which is substantially the same as 15 U.S.C. 13(c). Diversity jurisdiction was invoked for that ground under 28 U.S.C. § 1332.

The District Court awarded judgment for Nelson and against Rangen and Grimes in the sum of $18,900.00, trebled to $56,700.00 plus attorneys' fees in the amount of $7,500.00. The conclusions of law and opinion of the trial court state that its judgment was based upon 15 U.S.C. § 13(c). *Sterling Nelson & Sons, Inc. v. Rangen, Inc.* (D-Idaho) 235 F. Supp. 393 (1964). That court rejected the applicability of 15 U.S.C. § 1 and § 2, and decided it was unnecessary to consider the Idaho Code § 48-202(c), which is the Idaho counterpart of 15 U.S.C. § 13(c).

The United States Court of Appeals for the Ninth Circuit affirmed the judgment of the trial court. *Rangen, Inc. v. Sterling Nelson & Sons, Inc.*, (CA-9)

351 F. 2d 851 (1965) and awarded respondent $2,000.00 for its attorneys' fees for that appeal. In its opinion it was silent as to the District Court's conclusion that the Sherman Act, 15 U.S.C. § 1 and § 2, was inapplicable. It did mention that the application of the Idaho Code § 48-202(c) was found by the District Court to be inappropriate in view of its judgment based upon 15 U.S.C. 13(c).

The case is stated clearly and accurately in the findings of fact of the United States District Court for the District of Idaho. (References to the record are added).

> "1. Plaintiff is a corporation organized and existing under the laws of the State of Utah, with its principal place of business in Salt Lake City, Utah, and licensed to do business in the State of Idaho and various other States. Plaintiff is engaged in the manufacture and sale of fish food and other products in various States of the United States, including Idaho. Plaintiff competes with the defendant in the sale of fish food in several States, including the State of Idaho. (Undisputed).
>
> "2. Defendant Rangen, Inc. is an Idaho corporation with its plant in Buhl, Idaho. It is engaged in the manufacture and sale of fish food and other products in various states of the United States, including Idaho. It purchases ingredients for the manufacture of fish food in States other than Idaho as well as Idaho, and sells fish food in various States, including the State of Idaho. (Undisputed).
>
> "3. Buhl Feed and Ice Company, Inc., is merely a trade name of Rangen, Inc. under

which Rangen, Inc. does business. (Undisputed).

"4. Defendant Elwood D. Grimes is a citizen and resident of the State of Idaho and was employed by the State of Idaho in the Department of Fish and Game from 1939 to June 1, 1962, first as a biologist and then, from approximately 1950, as the Superintendent of the State's fish hatchery at Hagerman, Idaho. (Undisputed).

"5. During the four years immediately prior to the commencement of this action, the State of Idaho paid Rangen, Inc. approximately $539,600 for fish food sold by Rangen, Inc. to the State of Idaho (Tr. 30, 186, Ex. 16, Tr. 195, 206). During such period Rangen, Inc. was, with insignificant exceptions, the sole supplier of fish food to the State of Idaho for consumption at state fish hatcheries (Tr. 328, 329). Realistically, the transactions between Rangen, Inc. and the State of Idaho were sales of processed fish food and not contracts for services. (Tr. 15, 16, 18, 19, 39, 40, 48, 136, 137; Ex. 1, Tr. 16, 17; Ex. 16, Tr. 195, 206). The proportion supplied by the State of the ingredients of the final product delivered was relatively insignificant, and this was done for the purpose of circumventing the State Purchasing Agent and of attempting to give to a purchase transaction the appearance of a contract for services. (Tr. 15, 16, 18, 19, 39, 40, 48, 136, 137, 302-308, 321; Ex. 1, Tr. 16, 17; Ex. 16, Tr. 195, 206, and Idaho Code 67-1608).

"6. Rangen, Inc., for the period December, 1955, to June, 1962, paid defendant Elwood Grimes the sum of $24,947.80 (Tr. 26, 368; Ex. 2, Tr. 26, 29; Ex. 31, Tr. 427,428). Payments by Rangen, Inc. to Grimes were not disclosed to anyone in the Department of Fish and Game nor

to any other employee of the State of Idaho until they were discovered in February, 1962 (Tr. 240, 308, 322; Ex. 28, Tr. 350; Ex. 29, Tr. 351). Such payments were computed roughly but inaccurately as a percentage of gross sales of fish food made by Rangen, Inc. to customers other than the State of Idaho. (Tr. 422, 423, 431, 442; Ex. 2, Tr. 29, 416; Ex. 16, Tr. 195, 206; Ex. 30, Tr. 416, 417). During such period defendant Elwood Grimes was the authority in the Idaho Department of Fish and Game with respect to the safe utilization and nutritional value of fish foods and with respect to fish food formulae (Tr. 312, 334-337). The payments made by Rangen, Inc. to Elwood D. Grimes were made for the purpose, at least in substantial part, of influencing Grimes' conduct as an employee of the State of Idaho with respect to recommendations of fish food products for purchase by the State of Idaho, and such payments were made pursuant to an understanding between Rangen, Inc. and Grimes that Grimes would use his best efforts to obtain for Rangen, Inc. the fish food business of the State of Idaho (Tr. 26, 29, 49-52, 54-56, 63-71, 76-79, 81-88, 192-194, 368, 393-394, 402, 404-407, 436; Ex. 4, Tr. 58, 61; Ex. 5, Tr. 59, 74). Grimes did, in fact, influence the responsible officials of the State of Idaho to purchase substantially all its requirements of fish food from Rangen, Inc., and Grimes obstructed and impeded the testing of products and of other possible suppliers, including plaintiff, and action on favorable reports of such tests. (Tr. 89, 151, 173, 163, 167, 206, 232, 235, 311, 313, 315, 335-337, 369, 387, 388, 392-395, 400, 402; Ex. 8, Tr. 177; Ex. 16, Tr. 195, 206; Ex. 21, Tr. 313; Ex. 22, Tr. 314, 315).

"7. At various times during the period preceding 1962, plaintiff solicited James C. Simpson, Chief of Fisheries Management, for the

Idaho Department of Fish and Game, and other officials and employees of the State of Idaho, to purchase plaintiff's fish food, but James C. Simpson refused to accept plaintiff's offers to sell fish food to the State of Idaho and the State of Idaho failed to purchase any fish food from plaintiff during the four years immediately preceding the commencement of this action (Tr. 148-174; Ex. 8, Tr. 177; Ex. 9, Tr. 177; Ex. 10, Tr. 178; Ex. 14, Tr. 181; Ex. 17, Tr. 243; Ex. 18, Tr. 242, 244). The State of Idaho was not bound by any contract to purchase fish food from defendant Rangen, Inc. during the four years immediately preceding the commencement of this action, and during that period, could have at any time purchased fish food from any other source, including plaintiff. The State commenced to purchase fish food from other sources in 1962 on public bids under the State purchasing procedures, after disclosure of the payments by Rangen, Inc. to Grimes (Tr. 307, 308). Plaintiff was the successful bidder on the first of such public offers for bids (Tr. 172-173). The fish food offered for sale by plaintiff had been experimentally tested in 1958 and found suitable and substantially equal in grade and quality to that sold by Rangen, Inc. (Tr. 155, 232). Grimes, in 1957, refused to test plaintiff's product (Tr. 151).

"8. There were approximately eight companies, including defendant Rangen, Inc. and plaintiff Nelson & Sons, in competition with each other in the production and sale of fish food in the western states during all or part of the four year period prior to July, 1962. Four companies, including plaintiff and defendant Rangen, Inc., made offers or bids to supply the State of Idaho fish food requirements when the State first advertised for public offers in 1962 (Tr. 172). During the four year period immediately

prior to July, 1962, the State of Idaho paid Rangen, Inc. approximately $539,600 for fish food sold by Rangen, Inc. to the State of Idaho (Ex. 16, Tr. 195, 206). During such four year period, as a direct and proximate consequence of the wrongful conduct of defendant, Rangen, Inc. and defendant Grimes, as aforesaid, plaintiff was precluded from an opportunity to bid to supply the fish food requirements of the State of Idaho and to make inter-state sales of its products to the State of Idaho (Tr. 171-173). It is reasonably and conservatively probable that plaintiff Sterling Nelson & Sons, Inc. would have sold to the State of Idaho approximately one-fourth of its fish food requirements, representing gross sales at plaintiff's prices (Ex. 20, Tr. 250, 299) of approximately $126,000 during such four year period if there had existed a competitive market unaffected by the wrongful and restraining conduct of defendants (Tr. 173). It is reasonably probable that plaintiff would have realized a net profit of approximately fifteen per cent on the gross sales (Tr. 247, 250-257, 283, 287; Ex. 20, Tr. 250, 299). Plaintiff was damaged by defendants' wrongful conduct in the amount of $18,900."

SUMMARY OF ARGUMENT

The case is extremely narrow in its scope. It is a simple case of the type of "commercial bribery" to which the Robinson-Patman Act applies. The application of Section 2(c) of the Robinson-Patman Act [15 U.S.C. § 13(c)] to "commercial bribery" has been correctly and consistently made by prior decisions of the United States District and Circuit Courts. This Court has indicated that Section 2(c) of the Robinson-Patman Act proscribes "commercial bribery." The deci-

sions which apply the act to bribery in no way confuse its application to legitimate brokerage cases or reduced commission cases. Those cases merely decide, as Congress intended, that certain acts of unfair competition, as defined by Section 2(c), are illegal. In the case at bar one of those acts of unfair competition was committed by petitioners which proximately caused damage to respondent.

The District Court, affirmed by the Circuit Court, found that the bribe Rangen paid to Grimes was financed by Rangen's sales of fish food in interstate commerce. The record further reveals that the higher price Rangen charged Idaho for its fish food financed Rangen's lower prices for its sales to other states in interstate commerce. The bribe gave Rangen a competitive advantage in interstate commerce. It prevented a "primary line" competitor in interstate commerce from making sales to Idaho in interstate commerce. The case of *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954) was correctly applied to the facts of the case at bar. That application in no way conflicts with the decision in *Willard Dairy Corporation v. National Dairy Products Corporation* (CA-6) 309 F.2d 943 (1962) or the decision in *Borden Co. v. FTC* (CA-7) 339 F.2d 953 (1964). The Seventh Circuit Court of Appeals in the *Borden* case recognized that its decision in the *Borden* case and the decision in the *Willard Dairy* case are not in conflict with the *Moore* decision nor its application to a case such as the case at bar. The *Willard Dairy* and *Borden* decisions were not concerned with "seller's level" or "primary line" competition in

interstate commerce. The case at bar is a "seller's level" case in interstate commerce. The payments Rangen made to Grimes and the sales Rangen made to Idaho were transactions by Rangen while "engaged in commerce, in the course of such commerce" as contemplated by Section 2(c) of the Robinson-Patman Act.

The court correctly applied the decisions of this court and other courts to Nelson's proof of "fact of damage". The District Court found that during the relevant four year period (1958-1962), "as a direct and proximate consequence" of the bribe, Nelson was precluded from an opportunity to bid to supply the fish food requirements of the State of Idaho and to make interstate sales of its products to Idaho. That finding proves the "fact of damage." The proof of the fact of damage is further solidified by the record which reveals that Rangen feared the strength Nelson had in the market. Nelson offered its fish food to the State of Idaho at lower prices than Idaho paid Rangen. Nelson was successful in acquiring *all* of the Idaho business at the first bidding after competition for the business was restored. There is no conflict between the conclusion of "fact of damage" in this case and decisions of this court and lower courts.

The "amount of damage" to Nelson as a result of the bribe was "justly and reasonably estimated" according to prior decisions of this and lower courts. There were only three sellers qualified to make sales to the State of Idaho during the relevant period. After Grimes left the employ of the State of Idaho and competition for Idaho's business emerged, there were four

qualified sellers. In the competitive situation Nelson acquired 100 per cent of Idaho's business for the first four month period. After that period Nelson acquired one-half of the Idaho business. In Utah, where Rangen had an agreement with a Utah Fish and Game employee similar to its agreement with Grimes, causing a similar result, Nelson acquired one-half of Utah's business after said Utah employee revealed his agreement with Rangen to Utah officials. The court conservatively found that if competition had existed during the relevant period, Nelson would have sold Idaho one-fourth of its fish food requirements at Nelson's lower prices, and realized a net profit of fifteen per cent. The court's 15 per cent finding was conservative in view of Nelson's managers' and accountant's testimony that the net profit would have been between 16.5 per cent and 20 per cent.

In further support of the judgment, and pursuant to the procedure approved by this court in *Storey Parchment Co. v. Patterson Co.*, 280 U.S. 554 (1931) the respondent submits that violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. § 1 and § 2) are supported by the findings of fact and the record. The findings of fact and record reveal that Rangen and Grimes contracted and conspired to restrain trade and in fact did achieve their purpose. Said restraint affected interstate commerce. Further, the findings of fact and record reveal they attempted to monopolize and did in fact monopolize sales of fish food to the State of Idaho.

Respondent submits that the Idaho Code Section 48-202(c), in part, further supports the judgment of the courts below. That law is substantially the same as Section 2(c) of the Robinson-Patman Act.

ARGUMENT

I.

THE CIRCUIT COURT CORRECTLY APPLIED SECTION 2(c) OF THE ROBINSON-PATMAN ACT TO THE FACTS OF THIS CASE CONSISTENT WITH THE DECISIONS OF THIS COURT AND OTHER COURTS.

Section 2(c), 15 U.S.C. § 13(c) in part provides:

> "It shall be unlawful . . . to pay or grant or to receive or accept anything of value as a commission, brokerage or other compensation . . . either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid."

A. *Commercial Bribery and Price Discrimination Issues*

That section has been construed as an absolute prohibition against payments by a seller to a buyer's employee in connection with the sales. *Webb-Crawford Co. v. FTC* (CA-5) 109 F.2d 268 (1948) cert. denied 310 U.S. 638, 60 S.Ct. 1080, 84 L.Ed. 1406 (1940); *Fitch v. Kentucky-Tennessee Light & Power Co.* (CA-6) 136 F.2d 12, 149 A.L.R. 650 (1940). *Canadian In-*

gersoll-Rand Co. v. D. Loveman & Sons, Inc., (D.C.-N.D. Ohio) 227 F. Supp. 829 (1964). Lending further support to the application of Section 2(c) to Rangen's payments to Grimes is *FTC v. Henry Broch & Co.*, 363 U.S. 166, 80 S.Ct. 1158, 4 L.Ed. 2d 1124 (1960) wherein this Court said at footnote 6:

> "(A)lthough mentioned in the committee reports, the debates on the bill show clearly that Section 2(c) was intended to proscribe other practices such as the *bribing of a seller's broker by the buyer.*" (Emphasis added).

In the *Broch* case this Court cited legislative history of Section 2(c) that demonstrates a Congressional intent to proscribe Rangen's payments to Grimes:

> "H.R. Rep. No. 2287, 74th Cong. Sess. p. 14 (1936): The relation of the broker to his client is a fiduciary one. To collect from a client for services rendered in the interests of a party adverse to him, is a violation of that relationship; and to protect those who deal in the streams of commerce against breaches of faith in its relation of trust, is to foster confidence in its processes and promote its wholesomeness and value."

The *Fitch, Canadian-Ingersoll Rand, Webb-Crawford* cases and legislative history cited in the *Broch* case were correctly applied to the case at bar. Those decisions and their application to the case at bar do not conflict with any decision.

The petitioner states a false question and argument by submitting that discrimination is an essential element of a violation of Section 2(c) of the Robinson-Patman Act. Although there is evidence of a discrimi-

nation in the prices Rangen charged Idaho and other states (Ex. 30, pp. 9-10) it is not necessary. No decision requires that price discrimination be present for *every* violation of Section 2(c) of the Robinson-Patman Act. The decisions have unanimously held that Section 2(c) proscribes particular undesirable trade practices and that price discrimination is not a necessary element. *Southgate Brokerage Co. v. FTC* (CA-4) 150 F.2d 607 (1945); *Great Atlantic and Pacific Co. v. FTC* (CA-3) 106 F.2d 667, 675-677 (1939); *Oliver Bros. v. FTC* (CA-4) 102 F.2d 763, 767-768 (1939); *Biddle Purchasing Co. v. FTC* (CA-2) 96 F.2d 687, 690 (1938). A violation of Section 2(a) is not necessarily a violation of Section 2(c). *FTC v. Henry Broch Co.*, 363 U.S. 166, 170-171 (1960).

Petitioner inaccurately contends that the *Broch* case conflicts with the case at bar. From this court's decision in *Broch* it appears that price discrimination is relevant in reduced-commission cases. However, it does not follow that it is now an essential element in cases involving the outright payment of unearned brokerage or the bribe Rangen paid Grimes.

B. *"For Services Rendered" Issue*

Petitioners interject another false issue in their petition by contending that the payments Rangen made to Grimes were for services Grimes rendered to Rangen. Below, petitioners contended that Grimes rendered some service to Rangen and received royalties on Rangen's sales of fish feed in interstate commerce to customers other than the State of Idaho. However, the finding of fact of the District Court affirmed by the

Circuit Court and overwhelmingly supported by the record does not support that contention. The District Court found that the payments were made to Grimes "as an employee of the State of Idaho" for the purpose of influencing Grimes to cause Idaho to purchase its fish food requirements exclusively from Rangen. Said payments were made pursuant to an understanding that Grimes would use his best efforts to cause Idaho to purchase its fish food requirements exclusively from Rangen. *Sterling Nelson & Sons v. Rangen,* (DC-Idaho) 235 F. Supp. 393, 395.

As petitioners contended below, petitioners now contend that Grimes' causing Idaho to purchase its fish food requirements exclusively from Rangen was a service Grimes rendered to Rangen within the "services rendered" provision of Section 2(c). Petitioners' construction of Section 2(c) would contradict the intent of Congress as stated by this Court in *FTC v. Henry Broch and Co.*, supra, and the application of Section 2(c) in the *Fitch, Webb-Crawford and Canadian Ingersoll-Rand* cases. If "services rendered" were construed to include services performed by a buyer's agent for the seller but against the interest of the buyer, Section 2(c) would not fulfill the purpose intended by Congress. Such an application would also be in conflict with *Great Atlantic and Pacific Tea Co. v. FTC* (CA-3) 106 F.2d 667, cert. denied 38 U.S. 625, 84 L.Ed. 521 (1940).

There is no conflict between the Circuit Court's decision in this case and other decisions of this Court

and other courts which refer to bribery and the antitrust laws. The Circuit Court correctly and consistently said:

> "Where commercial bribery is associated with evils *which a particular provision of the antitrust laws was designed to prevent*, the fact that it was bribery rather than a more defensible arrangement ought not to preclude application of the statute."

That is consistent with those cases analogous to the case at bar which hold Section 2(c) proscribes Rangen's payment to Grimes. They are *Webb-Crawford Co. v. FTC* (CA-5) 109 F.2d 268 (1948) cert. denied 310 U.S. 638 (1940); *Fitch v. Kentucky-Tennessee Light & Power Co.* (CA-6) 136 F.2d 12 (1940); and *Canadian Ingersoll-Rand Co. v. D. Loveman & Sons, Inc.*, (D.C.-N.D. Ohio) 227 F. Supp. 829 (1964). Neither those decisions nor the Circuit Court's decision in this case are in conflict with a case construing a completely different statute, 15 U.S.C. § 20, which proscribes completely different action *United States v. Boston and Maine R.R.*, 380 U.S. 157 (1965), or a decision holding the Sherman Act inapplicable to a situation of gross misuse of official influence akin to bribery because competition between competitors was "feverish" and "strenuous", *Parmlee Transportation Co. v. Keeshin* (CA-7) 292 F.2d 794 (1961), or a case of "overreaching" and "fraud" in a lease agreement between an operator and owner of a service station, *Norville v. Globe Oil and Refining Co.* (CA-7) 303 F.2d 281 (1962). The case at bar involves bribery proscribed by Section 2(c) of the Robinson-

Patman Act, 15 U.S.C. § 13(c).

C. *"Governmental Official" Issue*

There is no conflict between the Circuit Court's decision and *United Mine Workers v. Penington*, 381 U.S. 657 (1965) and *Eastern R.R. Pres. Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). In *Noerr* this Court held that legitimate lobbying and third party propaganda campaigns for the purpose of influencing public officials were not prohibited by the Sherman Act regardless of the intent of the lobbyist.

In *Continental Ore Co. v. Union Carbide Corporation*, 370 U.S. 690 (1962) this court distinguished *Noerr* from that case. In that case this court decided that the acts of a wartime purchasing agent of the Canadian Government could be a part of the conspiracy alleged by that plaintiff under the Sherman Act. This court said that *Noerr* was different because it involved "(the) mere solicitation of governmental action with respect to the passage and enforcement of laws." Later, in *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) this court restated that distinction and said that the Sherman Act did not apply in that case to the attempted influencing of a public official who was "not claimed to be a co-conspirator."

Applying the Sherman Act decisions to the case at bar wherein the government employee, Grimes, is a co-conspirator, a conflict cannot be found. Petitioners' attempt to use the language of this court in cases other than 2(c) cases; namely, Sherman Act cases, fails to stir a conflict.

Consistent with the requirement that a government official be a "co-conspirator" to support a Sherman Act cause of action where the government official is a bribed party to a conspiracy or attempt to monopolize are the following decisions of lower courts: *Harman v. Valley National Bank of Arizona* (CA-9) 339 F.2d 564 (1964) and *Bankers Life and Casualty Co. v. Larson* (CA-5) 257 F.2d 337 (1958).

II.

THE CIRCUIT COURT CORRECTLY APPLIED THIS COURT'S DECISION IN *MOORE V. MEAD'S FINE BREAD*, 348 U.S. 115 (1954) IN HOLDING THAT THE PAYMENTS RANGEN MADE TO GRIMES IN CONNECTION WITH THE SALES OF FISH FEED RANGEN MADE TO IDAHO WHERE PAYMENTS AND SALES WHEN RANGEN WAS "ENGAGED IN COMMERCE, IN THE COURSE OF SUCH COMMERCE" AS PROVIDED BY SECTION 2(c) OF THE ACT [15 U.S.C. § 13(c)]. THAT APPLICATION IS NOT IN CONFLICT WITH ANY DECISION OF ANY COURT.

Rangen and Nelson competed for sales of fish food in interstate commerce at the seller's level. Rangen bribed Grimes in violation of Section 2(c) of the Robinson-Patman Act. As a result of the bribe Nelson was prevented from making *interstate* sales of fish food to Idaho. All other competitors at the seller's level were prevented from making sales of fish food to Idaho. Rangen's treasury used to finance the bribe was bolstered by revenue Rangen obtained from its

sales of fish food in *interstate* commerce (Tr. 408-420). Rangen introduced evidence that the amount paid Grimes was measured by Rangen's sales to States other than Idaho (Ex. 30, Tr. 408-441). If that is true, Grimes' payments were obviously in the course of interstate commerce. If it is not true, and Grimes' payments were tagged onto the Idaho sales, then clearly Rangen could charge States other than Idaho lower prices (unburdened by Grimes' commissions) than it charged Idaho and still keep the Idaho business (because of Grimes' influence), from an *interstate* competitor, Nelson, which offered to sell fish feed in *interstate commerce* to Idaho at prices lower than Rangen charged (Tr. 206). At pages 9 and 10 of Exhibit 30, Rangen's accountant reports that in many instances, Rangen charged other States lower prices than it charged Idaho during the relevant period (1958-1962). Rangen testified that the bribe was charged to "feed expense" which would affect all his prices to all States (Tr. 53). The bribe, resulting in Rangen's monopoly of the Idaho business, permitted Rangen to use a treasury fed by the higher Idaho prices to finance the lower prices Rangen charged other States.

The Circuit Court correctly applied this court's decision in *Moore v. Mead's Fine Bread*, 348 U.S. 115 (1954). That was a price discrimination case under Section 2(a) of the Robinson-Patman Act. The rationale of that case defining the meaning of "in the course of such commerce" in Section 2(a) is applicable to the meaning of the same phrase in Section 2(c). In

that case plaintiff operated a bakery in New Mexico, conducting an intrastate business. Defendant operated a bakery in New Mexico, selling bread in that state and also in Texas. Defendant was linked by corporate ownership with several other bakeries operating in New Mexico and Texas. Defendant cut his prices in New Mexico but not in Texas and was sued for violating Section 2(a) and injuring plaintiff's business. Despite the contention that the business was purely local—affecting a local competitor not doing interstate business—this court held the Robinson-Patman Act applicable. This court's quotation of legislative history and reasoning in support of that discrimination being "in the course of commerce" was as follows:

> "Where . . . a manufacturer sells to customers both within the State and beyond the State, he may not favor either to the disadvantage of the other; he may not use the privilege of intrastate commerce to the injury of his local trade, nor may he favor his local trade to the injury of his interstate trade. The Federal power to regulate interstate commerce is the power both to limit its employment to the injury of business within the State, and to protect interstate commerce itself from injury by influences within the State." 80 Cong. Rec. 9417.
>
> "We think that the practices in the present case are also included within the scope of the antitrust laws. We have here an interstate industry increasing its domain through outlawed competitive practices. The victim, to be sure, is only a local merchant; and no interstate transactions are used to destroy him. But the beneficiary is an interstate business; the treasury used to finance the warfare is drawn from inter-

state, as well as local sources . . ." 348 U.S. at 119.

The case at bar is within the rationale of *Moore*. Rangen was better able to compete with Nelson in his *interstate* business because he received an unfair preference in his local Idaho business. The payments to Grimes were in interstate commerce because they gave Rangen a definite advantage in his *interstate* business. And, the treasury Rangen used to finance the bribe was "drawn from interstate, as well as local sources."

The petitioner erroneously contends that *Moore's* application to the case at bar conflicts with the decisions of *Willard Dairy Corporation v. National Dairy Products* (CA-6) 309 F.2d 943 (1962) cert. denied 373 U.S. 934 (1963) and *Borden Co. v. FTC* (CA-7) 339 F.2d 953 (1964). Neither decision is in conflict with the case at bar.

In the *Willard Dairy* case plaintiff sued for violation of Section 2(a) of the Robinson-Patman Act. The plaintiff and defendant were engaged in the wholesale milk business in Ohio. Plaintiff only sold milk within Ohio. Defendant was engaged in the sale of milk in interstate commerce. The plaintiff alleged defendant charged different prices for milk in different areas *within Ohio only*. There was no mention of interstate commerce except that defendant was engaged in the sale of dairy products in interstate commerce. *The plaintiff was not engaged in interstate commerce.* That court affirmed summary judgment for defendant and this court denied certiorari.

In the *Borden* case Borden petitioned the United States Court of Appeals for the Seventh Circuit to review a decision of the Federal Trade Commission. In its "Portsmouth charge" the FTC had found that Borden, a firm engaged in interstate commerce, had a processing plant in Portsmouth, Ohio. Borden sold that milk within Portsmouth, Ohio. Borden apparently discriminated in the price it charged different purchasers in Portsmouth, Ohio. The court held there was no violation of Section 2(a) shown by the FTC. The Seventh Circuit Court distinguishes the *Borden* case and the *Willard Dairy* case from the *Moore* case and the case at bar where that court said:

> "We find ourselves in *complete accord* with Commissioner Elman where he discusses what we may designate as the 'Portsmouth charge'." (Emphasis added).

The full text of Commissioner Elman's dissent to the FTC's order is found under the "Borden Company" order to cease and desist Dkt. No. 7474, Trade Regulation Reporter [¶16,776 Transfer Binder 1963-1965]. At page 21,723 Commissioner Elman states the reasons why *Willard Dairy* and *Borden* are not in conflict with the case at bar. He says:

> "The authorities principally relied on by the Commission in its discussion of the commerce problem are concerned with a classic instance of territorial price discrimination: that of the powerful seller who cuts prices in one locality while maintaining higher prices elsewhere, in order to coerce or destroy his rivals in the particular locality. In such a case, the essence of the unlawful conduct is the interstate

seller's subsidizing his destructively low prices in one locality with profits obtained from the higher prices he is able to maintain elsewhere. Since his price cutting is sustained—'fed'—by his interstate business, it is proper to regard all of his interstate sales as 'purchases involved in such discrimination.' See Austin, Price Discrimination 17 (2d ed. 1959). *Thus, if the Portsmouth charge involved injury at the seller's level, I would be inclined to agree with the Commission that Willard Dairy Corp. v. National Dairy Products Corp.* [*1962 TRADE CASES Par. 70,556*], *309 F.2d 943 (6th Cir. 1962), was distinguishable, since the court in Willard did not direct its attention to whether the defendant's intrastate sales were being supported by its interstate business.* (Emphasis added)

"The Portsmouth charge involves, however, not injury to the seller's rivals through territorial discriminations, but injury to customers of the seller. In such a case, there is not the same nexus between sales made by a particular local division of the seller and the totality of his interstate business and so no justification for interpreting the 'any purchases' language to embrace such interstate business. While the focus in a primary-line case is on the aggrandizing tactics of the seller, in a secondary-line case it is on powerful buyers' demands for discriminatory price concessions; the seller's liability is based on his yielding to such demands. * * *

"In short, the special character of a primary-line case warrants an expansive reading of the 'any purchases' commerce requirements of Section 2(a), so as to confer jurisdiction in circumstances where a seller uses his interstate business to support and make possible the infliction of injury on local rivals. * * *

". . . the discriminatory sales from respondent's Portsmouth, Ohio plant seem clearly local in nature and without significant interstate incidents. * * *

"To sum up my views on the jurisdictional issue, the Commission demonstrates in its opinion that respondent is a large, multi-state concern engaged in, and making sales that are in, interstate commerce, and such a showing might well be sufficient to confer jurisdiction of primary-line allegations. The allegations at issue, however, involve the secondary line, and, consequently the Commission's failure to demonstrate that other than predominantly local sales were directly involved in the unlawful discrimination is decisive."

The case at bar is at the "seller's level" sometimes referred to as "primary-line" competition. The payment and sales involved in the Rangen-Idaho sales transactions gave Rangen, an interstate seller, an unfair advantage in interstate commerce over Nelson, a competitor in interstate commerce. Said advantage was financed by an illegal act proscribed by Section 2(c) of the Robinson Act. The Rangen-Idaho transactions are "in the course of such commerce" under the rationale of this court's decision in *Moore* and under Commissioner Elman's opinion incorporated by reference in the *Borden* case. The *Borden* case explains that there is no conflict with *Willard Dairy*.

In further support of their contention of conflict petitioners suggest that they rely upon a denial of a petition for a writ of certiorari in the *Willard* case. Such reliance has been consistently rejected by this

Court. As stated in a memorandum of Mr. Justice Frankfurter joined by Justice Harlen in *Elgin Joliet and Eastern R.R. Co. v. Gibson* 335 U.S. 897 (1957):

> "... (A) denial of certiorari does not imply approval of the decision of which review is sought or of its (this court's) supporting opinion."

At the Circuit Court respondent contended that there was another ground for finding that Rangen's payments to Grimes and sales to Idaho were "in commerce, in the course of such commerce" as provided by Section 2(c) of the Robinson-Patman Act. That ground was predicated upon the ingredients Rangen used to make the fish food being within the "stream of commerce" and, therefore, the transactions between Rangen, Grimes and Idaho were "in the course of such commerce."

Rangen purchased the ingredients of the fish food, whey, yeast and meal, from suppliers in other states and Canada in interstate commerce (Tr. 103). He mixed those ingredients and added a supplement. The mixture was fish feed. Rangen delivered that mixture to Idaho and other purchasers in interstate commerce.

In *Foremost Dairies Inc. v. FTC* (CA-5) 348 P.2d 674, 676 (1965) the court decided that Foremost charged discriminatory wholesale prices in interstate commerce in violation of Section 2(a) of the Robinson-Patman Act. The discriminatory prices were Foremost's wholesale milk prices to purchasers in New Mexico only. That court decided the discrimination in price occurred "in the course of such commerce" under

the "stream of commerce" doctrine sometimes applied to the Robinson-Patman Act. The product in the "stream of commerce" was milk. Foremost purchased the milk from farmers in Colorado, shipped it to New Mexico where it was standardized and pasteurized. Then it sold said milk to New Mexico purchasers at said illegal difference in price.

Although the Circuit Court in the case at bar decided that the "stream of commerce" doctrine does not apply, respondent must submit it as a further ground in support of Rangen's and Grimes' violation of 2(c) being "in the course of such commerce." Respondent submits that the mixing of whey, yeast and meal together and then adding a supplement is no more a change in the interstate character of the ingredients than "standardizing and pasteurizing" milk in contemplation of the "stream of commerce" doctrine.

III

THE CIRCUIT COURT CORRECTLY APPLIED THE DECISIONS OF THIS COURT AND OTHER COURTS TO THE ISSUES OF "FACT OF DAMAGE" AND "AMOUNT OF DAMAGE."

A. *Fact of Damage*

During the relevant period (1958-1962), as a direct and proximate consequence of the bribe Rangen paid to Grimes, Nelson was precluded from an opportunity to bid to supply fish food to the State of Idaho and from making interstate sales of fish food to Idaho

(Finding of Fact No. 8). That finding of the District Court affirmed by the Circuit Court supports the legal conclusion that Nelson was damaged by Rangen and Grimes' violation of the antitrust laws. It is proof of the "fact of damage." *Bigelow v. R K O Pictures, Inc.*, 327 U.S. 251 (1946), *Storey Parchment v. Patterson*, 282 U.S. 555 (1931), *Fox West Coast Theatre Corporation v. Paradise Building Corporation*, 264 F. 2d 602 (1958), *Richfield Oil Corporation v. Karseal Corporation*, (CA-9) 271 F.2d 709 (1959). That finding of fact should not now be undermined as support for the conclusion of the fact of damage, in view of Rule 52 of the Federal Rules of Civil Procedure, by petitioner's reference to James Simpson's testimony concerning his beliefs of how fish food should be purchased. That testimony was obviously discounted by the District Court and Circuit Court in view of said finding of fact and Simpson's (Chief of the Division of Fisheries, Idaho Department of Fish and Game) testimony that he looked to Grimes as the authority on the safe utilization, nutritional value and use of fish food (Tr. 312, 335-337) and stated that he, Simpson, was not qualified in that respect (Tr. 334-335, 387).

Under the decisions of this Court and other Courts, the exclusion from the market proximately caused by a violation of the antitrust laws, is enough to prove the "fact of damage." However, in this case the record includes considerably more evidence which establishes the "fact of damage." In the case at bar Rangen kept the bribe secret during the relevant

period because he was afraid Nelson would expose it and acquire some of the Idaho business (Tr. 51). Nelson offered to sell the fish food to the State of Idaho at lower prices than Idaho paid Rangen for fish food during the relevant period (Tr. 163, 206). When the bribe was exposed and Idaho put its fish food purchases out to bid Nelson got all of the Idaho business for the first four month period and thereafter one-half of the Idaho business (Tr. 173). In Utah, when Rangen's payments to a Utah Fish and Game employee were exposed Nelson acquired one-half of the Utah business (Tr. 187-189).

Clearly, the bribe caused Nelson to lose sales to the State of Idaho it *probably* would have made during the relevant period but for the bribe Rangen paid Grimes. Nelson proved the bribe prohibited Nelson from bidding for and making sales to Idaho. There is no conflict between the decisions cited by petitioners and the decision of the Ninth Circuit in the case at bar.

B. *Amount of Damage*

The Circuit Court correctly applied the decision of this Court in *Bigelow v. R K O Pictures, Inc.*, 327 U.S. 251 (1942) and lower courts in *Richfield Oil Corporation v. Karseal Corporation* (CA-9) 271 F.2d 709 (1959) and *Lessig v. Tidewater Oil Co.* (CA-9) 327 F.2d 459 (1964) in concluding that Nelson was damaged in the amount of $18,900.00. That was a "just and reasonable estimate" of the amount of damage.

Nelson proved the net profits it lost by being prohibited from selling to the State of Idaho by two types of evidence. Cal Nelson, the Vice President and General Manager of Nelson, a relatively small family held company, testified he was intimately acquainted with all of the company's activities. He was in charge of production and had been for a period of many years. He was well acquainted with the products and ingredients which went into fish food and with the labor costs and all of the expenses involved. He testified that in his opinion the percentage of net profit was approximately 20 per cent of the sales price of fish food (Tr. 283-287).

The second item of evidence with respect to net profit was that represented by Exhibit 20 (Tr. 250, 299), a chart prepared by a Nelson accountant. He set forth the gross and net profit which had been made by the company for three years prior to the time that it manufactured fish food. The chart sets forth the actual figures as to the amount of sales, gross sales price, gross profit, and actual expenses and costs, and the actual net profit for the company as a whole for three years prior to the time that the manufacture of fish food became part of the business. He sets forth the same actual figure for the four years after fish food became part of the business. Then he computed the actual figures on the sale of fish food. The remainder of the figures were interpolated. He assumes from his knowledge of the business and for the purpose of trying to ascertain the reasonable and fair estimate of the profits, that the profits, net and gross,

from the business other than fish food would have been the same for the following four years as they had been for the previous three years and that the additional profits enjoyed by the company were attributable to and allocable to the fish food business, and in that way, he ascertained the probable or reasonable estimate of the net profit for each year for the four years on the sale of fish food. He averaged those, and the result was a computation of 16.5 per cent net profit from the sale of fish food. Exhibit 20 prepared by Don Nelson, the company's Sales Manager, based on Mr. Viehwig's Exhibit 16, (Rangen's accountant) revealed how much the State of Idaho had paid for fish food over the four years and Nelson's chart revealed how much the State would have paid for the same amount of fish food purchased from Nelson during that period. Exhibit 16 reveals that had Nelson sold the same poundage to Idaho that Rangen sold, the gross sales would have come to approximately $504,000.00 and applying 16.5 per cent net profit to that figure the damage to the plaintiff would have been approximately $83,000.00. The Court, exercising ultra conservatism, did not adopt the 20 per cent net profit estimate, or the 16.5 per cent estimate, but the lower figure of 15 per cent, and crediting Nelson with only one-fourth of the market, came up with the damage figure of $18,900.00.

A study of the adjudicated cases in the area of "amount of damage," readily dispels any impression that this question of damage is governed by an application of the common law rule of reasonable certainty. The cases have long since departed from this rule in

antitrust legislation (*Storey Parchment Co. v. Patterson*, supra). In connection with the proof of "amount of damages" in antitrust cases this Court said in *Bigelow v. R K O Pictures*, supra:

> "The most elementary conception of justice and public policy require that the wrongdoers shall bear the risk of uncertainty which his own wrong has created * * *
>
> "The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery for a proven invasion of the plaintiff's right."

In the *Biglow* case the plaintiff did not go as far in proving its lost net profits as Nelson did in the case at bar. This court said in response to Bigelow's proof of lost profits:

> "The evidence here was ample to support a just and reasonable inference that petitioners were damaged by respondents' action, whose unlawfulness the jury has found, and respondents do not challenge. The comparison of petitioners' receipts before and after respondents' unlawful action impinged on petitioners' business afforded a sufficient basis for the jury's computation of the damage, whether respondents' wrongful action had prevented petitioners from making any more precise proof of the amount of damage."

There is no conflict between the Ninth Circuit's decision in regard to the issue of damages and prior decisions of this Court or the authorities cited by petitioners. Petitioners are apparently confusing proof of "fact of damage" with proof of "amount of damage."

IV.

THE RECORD AND FINDINGS OF FACT SUPPORT THE CONCLUSION OF LAW THAT DEFENDANTS VIOLATED SECTIONS 1 AND 2 OF THE SHERMAN ACT, AND THAT CONCLUSION WOULD SUPPORT THE JUDGMENTS OF THE DISTRICT COURT AND CIRCUIT COURT.

The decision of this Court in *United States v. Women's Sportswear Association*, 336 U.S. 460 (1949) demonstrates from the standpoint of the facts and the law, that the transactions between Rangen, Grimes and the State of Idaho, reveal both a restraint of trade and such restraint as substantially affects interstate commerce.

In the *Women's Sportswear* case, an association of cloth stitching contractors entered into a contract with clothing suppliers referred to as jobbers, by which the jobbers agreed that they would not supply any cloth or stitching to any stitching contractors except those who were members of the association. This court found that contract was in violation of Sections 1 and 2 of the Sherman Act.

In the case at bar Nelson, a competitor of Rangen in interstate commerce, was precluded from making sales in 35 per cent of the fish food market in Idaho. The State of Idaho purchased approximately 35 per cent of the fish food purchased in Idaho during the relevant (1958-1962) period (Tr. 223). That restraint of trade and injury to Nelson was caused by Rangen's and Grimes' conspiracy to restrain trade, attempt to

monopolize trade and their monopoly of the state's business.

The mere fact that a bribe was involved should not remove the application of the Sherman Act. *Bankers Life & Casualty Co. v. Larsen* (CA-5) 247 F.2d 377 (1958) and *Continental Ore Co. v. Union Carbide Corporation*, 370 U.S. 690 (1962).

The manifest purpose and intent of the contract between Rangen and Grimes was to restrain the State of Idaho from a free choice among fish food suppliers. This is apparent from the contract and letters between Rangen and Junius Powell, a Utah Fish and Game employee. The contract between Grimes and Rangen was substantially the same for Idaho as the Rangen-Powell contract in Utah (Tr. 25-28, 85, 86, 402, 436; Ex. 4, Tr. 58, 61; Ex. 5, Tr. 59, 74).

In the *Women's Sportswear* case this court said:

> "The manifest purpose and intent of the contract in question, was to restrain the jobbers from free choice among stitching contractors on equal terms."

V.

THE IDAHO CODE SECTION 48-202(c) IS SUBSTANTIALLY THE SAME AS 15 U.S.C. § 13(c). IDAHO CODE SECTION 48-204 IS SUBSTANTIALLY THE SAME AS 15 U.S.C. § 15. THOSE SECTIONS SUPPORT THE JUDGMENT, IN PART.

The Idaho Code provides that if a "plaintiff" is injured as a result of a violation of Idaho Code § 48-202(c) said plaintiff is entitled to recover threefold

the damages by him sustained, and the costs of suit, including a reasonable attorney's fee. The respondent invoked the diversity jurisdiction of the United States Courts for this ground. Under this ground there is no issue of interstate commerce. There is a different limitation period. Respondent contends it is a three year period under Idaho Code Section 5-218. Petitioner has contended it is a two year period under Idaho Code Section 5-219. Respondent submits that the three year limitation applies since Idaho Code 48-204 does not provide for a penalty or forfeiture. Respondents' reasons are the same as the courts in *Christensen v. Paramount Pictures Inc.* (DC-Utah) 95 F. Supp. 46 (1950) where the court held that the Sherman Act and Clayton Act did not provide for a "penalty or forfeiture" within the meaning of a Utah statute of limitation which is the same as Idaho's Section 5-218.

CONCLUSION

The petition for certiorari should be denied.

Dated this 18th day of February, 1966.

Respectfully submitted

PAUL H. RAY
Counsel for Respondents

Of Counsel:
MARVIN J. BERTOCH
L. RIDD LARSON

APPENDIX

15 U.S.C. § 1:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: Provided, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: Provided, further, that the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms or corporation in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890 c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

15 U.S.C. § 2:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 2, 26 Stat. 209; July 7, 1965, c. 281, 69 Stat. 282.

15 U.S.C. 13(c):

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

15 U.S.C. § 15:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, §4, 38, Stat. 731.

Idaho Code § 48-202(c):

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, any thing of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise; provided, however, that in all such transactions of sale and purchase it shall be unlawful for either party to such transaction to pay or grant anything of value as a commission, brokerage or other compensation, or any allowance or discount in lieu thereof, to the other party to the transaction or to any agent, representative, or other intermediary therein, where such agent, representative, or other intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of the said other party to such transaction.

Idaho Code § 48-204(a):

Any person injured by any violation, or who will suffer injury from any threatened violation, of this act, may maintain an action, in any court of competent jurisdiction of this state, to prevent, restrain or enjoin such violation or threatened violation. If in such action, a violation or threatened violation of this act shall be established, the court shall enjoin and restrain or otherwise prohibit such violation or threatened violation, and the plaintiff in said action shall be entitled to recover threefold the damages by him sustained, and the costs of suit including a reasonable attorney's fee.

Idaho Code § 5-218(1):

Within three years:

An action upon a liability created by statute, other than a penalty or forfeiture.